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January 20, 2015

**Via ECFS**

Marlene Dortch, Secretary  
Federal Communications Commission  
445 12th Street, SW  
Washington, DC 20554

**Re: American Cable Association Ex Parte Submission on *Protecting and Promoting the Open Internet*, GN Docket No. 14-28; *Framework for Broadband Internet Service*, GN Docket No. 10-127; *Implementation of Section 224 of the Act*, WC Docket No. 07-245; *A National Broadband Plan for Our Future*, GN Docket No. 09-51**

Dear Ms. Dortch:

In a January 12, 2015, *ex parte* letter, the American Cable Association (“ACA”) explained that reclassifying broadband Internet access service as a telecommunications service subject to Title II for smaller Internet Service Providers (“ISPs”) is not supported by the facts, the record in the Open Internet proceeding (GN Dockets No. 14-28 and 10-127), or the statute.<sup>1</sup> Accordingly, any Commission action to reclassify this service for these ISPs would be arbitrary and capricious and contrary to law. Not only is reclassification unjustified, but imposing burdensome Title II requirements on smaller ISPs would be counterproductive, especially when they are investing in high-performance broadband infrastructure and services. ACA then stated that should the Commission nonetheless adopt an approach that involves reclassification, it should at least forbear from imposing and enforcing on smaller ISPs the requirements of Title II, including Sections 201, 202, and 208. ACA also submits, as discussed herein, that should the Commission pursue reclassification, it needs to ensure that rates for access to poles, ducts, and conduit do not increase for cable operators providing broadband Internet access service. This is a particular concern for ACA cable operator members that operate in less dense areas and need

<sup>1</sup> Letter of Barbara S. Esbin, Cinnamon Mueller, Counsel for ACA, to Marlene H. Dortch, Secretary, FCC, GN Dockets No. 14-28 and 10-127 (filed Jan. 12, 2015).

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access to more poles to provide service but have fewer subscribers per square mile over which to spread costs.

If broadband Internet access service (or a portion thereof) is reclassified as a telecommunications service, ISPs will ostensibly be treated as “telecommunications carriers” under Section 224 of the Communications Act, as amended,<sup>2</sup> which confers upon cable system operators and telecommunications carriers the right of “nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled” by a utility at rates prescribed by Commission formulas guided by Section 224. ACA is concerned that such action would subject its cable operator members to significantly higher attachment rates, inadvertently threatening the very broadband deployment the Commission seeks to facilitate, and it urges the Commission to take action by granting the *NCTA Reconsideration Petition*.<sup>3</sup>

Under the Commission’s rules regarding pole attachment rates, there is a bifurcated system for cable operators and telecommunications carriers. Cable operators long have been afforded the lower “cable rate” for their provision of cable service and broadband Internet access service over their cable systems.<sup>4</sup> While the Commission in 2011 took steps to modify the two pole attachment formulas in its rules and thereby largely eliminate the disparities between the rates paid by cable operator and telecommunications carriers,<sup>5</sup> there can still be a considerable disparity when a pole owner uses the actual average number of attachers on its poles in the formula, rather than presumptions provided in the Commission’s rules. Admittedly, where the

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<sup>2</sup> Similarly, in those States that have certified to the Commission under Section 224 that they regulate access to and rates to utility owned poles, conduits, ducts, and other rights-of-way (“poles”), the reclassification of ISPs may render State regulation concerning attachments to poles applicable to ISPs for the first time or, where they are already cable operators, in a different way.

<sup>3</sup> See Petition for Reconsideration or Clarification of the National Cable & Telecommunications Association, Comptel and TW Telecom Inc., WC Docket No. 07-245, GN Docket No. 09-51 (filed June 8, 2011) (“NCTA Reconsideration Petition”) (seeking reduction of the remaining potential disparity between the cable rate and the telecommunications rate and better achievement of the purposes of the *2011 Pole Attachment Order*).

<sup>4</sup> See *In the Matter of Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, Report and Order and Order on Reconsideration, 26 FCC Rcd. 5240, ¶ 12 (2011) (“2011 Pole Attachment Order”) *aff’d sub nom American Electric Power v. FCC*, 708 F.3d 183, 185 (D.C. Cir. 2013), *pet’n for cert. denied* 571 U.S. \_\_\_\_ (Oct. 7, 2013).

<sup>5</sup> See *2011 Pole Attachment Order*.

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presumptions are used, the cable operator and telecommunications carrier formulas yield identical rates equal to the rate that was provided through the cable rate prior to the *2011 Pole Attachment Order*. But where the pole owner foregoes the presumptions and uses actual data, and the average number of attachers is less than the Commission's presumptions, the telecommunications rate can be significantly higher than the cable rate.<sup>6</sup> The unintended consequence of any reclassification decision, therefore, is that cable operators that otherwise do not provide a telecommunications service today may face higher pole attachment rates if a pole owner chooses to use the Commission's presumptive numbers of attachers in establishing its telecommunications rate. If the attachment rates of cable operators that also provide broadband Internet access service increase as a result of a reclassification decision, that decision would create disincentives for broadband deployment and investment by affected cable operators, especially for those operating in less dense areas where access to more poles is generally required and where there are fewer subscribers over which to spread costs. It would also would create pressure to increase retail rates for broadband Internet access service, harming subscribers and dampening adoption of the service by those not yet connected.

To avoid the unintended consequence of increased pole attachment rates for the many cable operators that also provide broadband Internet access service, the Commission should take immediate action to reduce, if not eliminate, any remaining disparities between the cable and telecommunications rates. As the Wireline Competition Bureau, quoting the Commission, has noted, "reducing the telecom rate to be lower and closer to uniform with the cable rate 'will better enable providers to compete on a level playing field, will eliminate distortions in end-user choices between technologies, and lead to provider behavior being driven more by underlying economic costs than arbitrary price differentials.'"<sup>7</sup> The Commission already has before it a petition for reconsideration or clarification of the *2011 Pole Attachment Order* from the National Cable & Telecommunications Association and others which asks the Commission to further adjust the telecommunications carrier pole attachment formula – finishing what it started in the *2011 Pole Attachment Order* – to significantly reduce the remaining potential disparity between the cable rate and the telecommunications carrier rate and better achieve the foregoing stated purposes of the *2011 Pole Attachment Order*.<sup>8</sup>

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<sup>6</sup> See, e.g., *NCTA Reconsideration Petition* discussing disparities of 70% or more.

<sup>7</sup> *Implementation of Section 224 of the Act, A National Broadband Plan for Our Future*, WC Docket No. 07-245, GN Docket No. 09-51, Order, DA 11-980, ¶ 12 (WCB rel. June 1, 2011) (quoting *2011 Pole Attachment Order* at ¶¶ 134).

<sup>8</sup> See *NCTA Reconsideration Petition* at 4-7.

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ACA continues to maintain that reclassification of broadband Internet access service is unwarranted and contrary to law but submits that if the Commission nonetheless takes this step, granting the *NCTA Reconsideration Petition* concurrently with any reclassification of broadband Internet access service will greatly reduce the potential negative impact of increased pole attachment rates on cable operators that are also ISPs and on broadband deployment and investment and on retail rates.<sup>9</sup>

This letter is being filed electronically pursuant to Section 1.1206 of the Commission's rules.

Sincerely,



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<sup>9</sup> Even if the Commission declines to reclassify broadband Internet service, which it should, it should proceed to grant the *NCTA Reconsideration Petition*.